

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 005802
Issued to: Donald J. Oldow

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

No. 2373

Donald J. Oldow

This appeal has been taken in accordance with 46 U.S.C. 239(g), and 46 CFR 5930-1.

By order dated 25 April 1983, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington suspended Appellant's license for two months on six months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator on board the M/V SHAMAN under authority of the license above captioned, on or about 22 July 1982, Appellant failed to properly navigate the vessel in the confined waters adjacent to Knights Island, Prince William Sound, Alaska, thereby contributing to the grounding of the vessel.

The hearing, was held at Anchorage, Alaska on 4 and 5 January, 1983.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence seven exhibits and the testimony of one witness.

In defense, Appellant offered in evidence nine exhibits, which included two depositions, and the testimony of three witnesses.

After the hearing, the Administrative Law Judge rendered a written Decision and Order on 25 April 1983 in which he concluded that the charge and specification had been proved and suspended all licenses issued to Appellant for a period of two months, on six months' probation.

The Decision and Order was served on 28 April 1983. Appeal was timely filed on 25 May 1983 and perfected on 18 October 1983.

FINDINGS OF FACT

The M/V SHAMAN is an inspected small passenger vessel and is

owned jointly by Appellant and his wife, Pamela F. Oldow. Pamela F. Oldow is licensed as an operator, and is endorsed on the vessel's Certificate of Registry as its master. The vessel is regularly engaged in the cruise, tour, and fishing charter business as a joint husband-wife venture. At the time in question, the vessel was transporting a party of four geologists on a charter for hire out of Seward, Alaska.

During this trip both Appellant, who is licensed as Master of United States Steam or Motor Vessels of any Gross Tons, Ocean, and his wife navigated the vessel. On the morning of 22 July, with Appellant at the conn, the vessel proceeded from Little Bay to Mummy Bay. Entering Mummy Bay, Mrs. Oldow took over the conn, and Appellant went forward to drop anchor for a lunch break.

At 1530, Appellant navigated the vessel from Mummy Bay back to Little Bay, where the geologists departed via rubber boat to collect specimens at points close inshore. They planned to rejoin M/V SHAMAN at Mummy Bay. At 1635, while attempting to retrace the morning's route, Appellant struck a charted reef and fetched up on the rocks on the southern promontory of Mummy Bay. The vessel was proceeding at about 10 knots at the time.

During the first two transits of this area, the rocks were plainly visible to Appellant. However, on the third transit they were awash because of a higher tide. The west shore of Knights Island, the area in which the vessel grounded, has many outcroppings of rocks, and it was known to Appellant as "foul ground." Nonetheless, no track lines were plotted on the chart, and the radar was not used for navigation. Appellant navigated by use of magnetic compass and his "seaman's eye" alone. He determined the M/V SHAMAN's headings and course changes by visual reference to the shoreline and nearby landmarks. In spite of the rocks, he navigated the vessel close to shore.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that the Administrative Law Judge erred in finding that:

1. Appellant was acting under the authority of his license at the time of the grounding; and
2. Appellant was negligent in the grounding.

APPEARANCE: James D. Gilmore, Attorney at Law, Resolution Tower, Suite 304, 1031 West Fourth Avenue, Anchorage, Alaska 99501.

OPINION

I

Appellant contends that he was not serving aboard the M/V SHAMAN under the authority of his license, and for that reason, jurisdiction to proceed against that license did not exist. I do not agree.

The applicable regulation, 46 CFR 5.01-35, states:

A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document held by him either when the holding of such license, certificate or document is required by law or regulation or is required in fact as a condition of employment....

The M/V SHAMAN is an inspected small passenger vessel. 46 U.S.C. 390c(b) requires that it comply with its certificate of inspection. The certificate of inspection required 2 licensed ocean operators, but provided that when the vessel is operating not more than 12 hours in any 24 hour period it may be operated with one licensed ocean operator.

Appellant's license as master authorized him to serve as Operator of the M/V SHAMAN. 46 CFR 186.10-1(b).

Appellant contends that since the voyage in question did not involve the operation of the M/V SHAMAN for a period of more than 12 hours in any 24 hour period, only one licensed operator was required and that licensed operator was Pamela F. Oldow because she was listed as master on the Certificate of Registry. Appellant argues that even though he was at the wheel of the vessel, and was otherwise in control of the operation of the vessel for a substantial part of the time prior to grounding, he was not acting under the authority of his license.

An "operator" license is not a management license. Rather, it is a control license. Appeal Decision No. 2292 (COLE). An "operator" is subject to charges for professional activities peculiar to his licensed status solely for the period during which he is directing and controlling the vessel. See Appeal Decisions Nos. 2262 (SHERMAN), 2249 (DURAND), and 2153 (McKENNEY). Therefore, the relevant inquiry is who was in control of the vessel at the time in question, not who was listed as master.

At the time of the grounding Appellant was in control of the M/V SHAMAN. Pamela Oldow was below, as she had been for some

period of time, seated at the dining table conversing with several of the passengers. Since Appellant was at the wheel and in full control of the vessel's navigation for a substantial period of time before and at the time of the grounding, the Administration Law Judge's finding that Appellant was serving as Operator of the vessel during the transit in which it grounded is fully supported by the evidence. Where, as here, the Administrative Law Judge's finding is not unreasonable, it will not be disturbed. Appeal Decisions Nos. 2302 (FRAPPIER) and 2333 (AYALA).

II

Appellant argues that he was not negligent in the operation of the vessel, and that the presumption of negligence, which arises when a moving vessel grounds or strikes a stationary object, was rebutted when he testified that the grounding was the result of an unforeseeable and unknown countercurrent which forced the vessel onto the submerged rocks. I do not agree.

It is a matter of law, no longer in dispute, that when a moving vessel strikes a stationary object, a presumption of negligence arises, and a heavy burden is placed on the operator of the vessel if he is to rebut the presumption. Appeal Decisions Nos. 2284 (BRAHN) and 2266 (BRENNER). The rationale for the presumption is elementary. Ships under careful navigation do not run aground or strike fixed objects in the ordinary course of events. The presumption of negligence exists in an allision, where the mariner either knew or should have known of the presence of the unmoving object. It is clearly raised here, where the Operator allowed his vessel to strike rocks which were charted, and which were visible on two previous passages of the area earlier that day.

In his attempt to rebut the presumption, Appellant testified that he first became aware of a countercurrent when a fishing vessel approached to render assistance after the grounding. He describes this countercurrent as having an intensity of about 3 knots with a northwest set which greatly surprised him as it was not reported in any of the nautical literature describing the area. The evidence does not show that this current was so strong or encountered so suddenly that the vessel could not have maintained its course because of it. Had Appellant known his position accurately, he would have been aware that he was off course and could have compensated.

The Administrative Law Judge found that Appellant's evidence was insufficient to rebut the presumption. The evidence supports this finding. Appellant, in his testimony about a countercurrent, has simply provided evidence of an event or circumstance which is essentially neutral. To rebut the presumption, he would have to

show that the effect of the current was beyond the control of a prudent vessel operator. This, he has not done. The evidence is clear that Appellant did not know his vessel's position with sufficient accuracy to know if he was being set onto the rocks or not.

in addition, the Administrative Law Judge found Appellant negligent, apart from the presumption. This was based on the fact that Appellant was navigating by "seaman's eye" in spite of having an operational radar and a chart which he could have used to determine the vessel's position accurately. He estimated the vessel's position and made course changes solely by observing the shoreline and nearby landmarks. In addition, Appellant chose to navigate close to shore in the vicinity of rocks which he knew or should have known to exist.

Failure to establish a vessel's position when radar is available will support a finding of negligence. See Appeal Decision No. 2034 (BUFFINGTON). Failure to ascertain his position by radar or other sufficient means in known dangerous waters constitutes negligent failure to determine the precise position of a vessel. Appeal Decision No. 2214 (CHRISTENSEN).

The Administrative Law Judge's finding that Appellant was negligent apart from the presumption, is well supported.

CONCLUSION

There is substantial evidence of a reliable and probative character to support the findings that the charge and specification are proved. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington, on 25 April 1983 is AFFIRMED.

B. L. STABILE
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 16th day of October, 1984.